

PART 1216—TESTIMONY BY MSPB EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS

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AUTHORITY: 5 U.S.C. 1204(h); 31 U.S.C. 9701.

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Subpart A—General Provisions

§ 1216.101 Scope and purpose.

(a) This part establishes policy, assigns responsibilities and prescribes procedures with respect to:

(1) The production or disclosure of official information or records by MSPB employees, advisors, and consultants; and

(2) The testimony of current and former MSPB employees, advisors, and consultants relating to official information, official duties, or the MSPB's record, in connection with federal or state litigation in which the MSPB is not a party.

(b) The MSPB intends this part to:

(1) Conserve the time of MSPB employees for conducting official business;

(2) Minimize the involvement of MSPB employees in issues unrelated to MSPB's mission;

(3) Maintain the impartiality of MSPB employees in disputes between private litigants; and

(4) Protect sensitive, confidential information and the deliberative processes of the MSPB.

(c) In providing for these requirements, the MSPB does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of MSPB. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

§ 1216.102 Applicability.

This part applies to demands and requests to current and former employees, advisors, and consultants for factual or expert testimony relating to official information or official duties or for production of official records or information, in legal proceedings in which the MSPB is not a named party. This part does not apply to:

(a) Demands upon or requests for an MSPB employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the MSPB;

(b) Demands upon or requests for a former MSPB employee to testify as to matters in which the former employee was not directly or materially involved while at the MSPB;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or

(d) Congressional demands and requests for testimony, records or information.

§ 1216.103 Definitions.

The following definitions apply to this part.

(a) *Demand* means an order, subpoena, or other command of a court or other competent authority for the production, disclosure, or release of

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records or for the appearance and testimony of an MSPB employee in a legal proceeding.

(b) *General Counsel* means the General Counsel of the MSPB or a person to whom the General Counsel has delegated authority under this part.

(c) *Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

(d) *MSPB* means the Merit Systems Protection Board.

(e) *MSPB employee or employee* means:

(1)(i) Any current or former employee of the MSPB;

(ii) Any other individual hired through contractual agreement by or on behalf of the MSPB or who has performed or is performing services under such an agreement for the MSPB; and

(iii) Any individual who served or is serving in any consulting or advisory capacity to the MSPB, whether formal or informal.

(2) This definition does not include persons who are no longer employed by the MSPB and who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the MSPB.

(f) *Records or official records and information* all information in the custody and control of the MSPB, relating to information in the custody and control of the MSPB, or acquired by an MSPB employee in the performance of his or her official duties or because of his or her official status, while the individual was employee by or on behalf of the MSPB.

(g) *Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court of other competent authority.

(h) *Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

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Subpart B—Demands or Requests for Testimony and Production of Documents

§ 1216.201 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

§ 1216.202 Factors the MSPB will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) Allowing such testimony or production of records would assist or hinder the MSPB in performing its statutory duties;

(d) Allowing such testimony or production of records would be in the best interest of the MSPB or the United States;

(e) The records or testimony can be obtained from other sources;

(f) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rule of procedure governing the case or matter in which the demand or request arose;

(g) Disclosure would violate a statute, Executive Order or regulation;

(h) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;

(i) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;